Supreme Court, U.S.
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No. 95-968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MARK EINZIGER,

Petitioner,

vs.

ARTHUR JACOBS, DONALD HELLER, ELLIOT BLACK, and KENNETH JACOBS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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25 pp

QUESTION PRESENTED

Should this Court exercise its authority under Article III, Section 1, of the United States Constitution to reverse a decision of the United States Court of Appeals for the Third Circuit which squarely conflicts with at least four decisions of this Court which hold that a non-party to a litigation who asserts control of the litigation for his own interest is bound by the result thereof?

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No.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States District Court, District of New Jersey, granting Respondents' motion for summary judgment is not reported (Appendix B, A-3-A-8). The decision of the United States Court of Appeals for the Third Circuit, affirming the decision of the district court without opinion, is reported at 67 F3d 291 (Appendix A, A-1-A-2). The decision of the Court of Appeals denying Petitioner's suggestion for rehearing in banc is not reported (Appendix C, A-9).

STATEMENT OF JURISDICTION

The judgment order of the United States Court of Appeals for the Third Circuit was entered on September 20, 1995. The denial of Petitioner's suggestion for rehearing in banc was issued November 9, 1995. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 1 of the United States Constitution provides:

The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

STATEMENT OF THE CASE

A. *The Arbitration*

On November 9, 1990, Petitioner ("Einziger") was discharged by his employer, Stacey Allison Ltd. (the "Company"). Einziger's written employment agreement (the "Agreement") provided that due cause for discharge included the failure to discharge his duties and responsibilities "as determined by the Board of Directors of the Company, whose good faith determination with respect thereto shall be conclusive and binding on the Employee." The Agreement also contained an arbitration provision which provided that an award thereunder "shall include attorneys' fees and costs to the prevailing party".

On December 10, 1990, Einziger commenced arbitration against the Company contesting his discharge. The Company opposed arbitration in an action in the New Jersey Superior Court on the ground that under the Agreement the decision of the board of directors of the Company was binding upon Einziger. On May 6, 1991, the superior court directed arbitration limited to determining "whether the Board of Directors of Stacey Allison, Ltd. acted in good faith" in its decision to terminate Einziger's employment.

Einziger commenced this action on December 28, 1990, prior to the decision of the superior court directing arbitration, asserting federal jurisdiction under 28 U.S.C. §1332 (diversity of citizenship). He alleged that Respondents, the four principals of the Company, who were not parties to the Agreement and hence not subject to arbitration, fraudulently employed him solely in order to obtain his business and had no intention of keeping him in the Company's employ. In September 1991, after the decision of the New Jersey court directing arbitration, Respondents moved to stay this action pending arbitration on the ground that the parties had agreed to arbitrate "the ultimate issue of this action". The district court granted the motion for a stay with Einziger's consent.

After the arbitration commenced, it quickly became apparent that the Company was insolvent and would be incapable of responding to an arbitration award. In view of this, Einziger asked that the Company and Respondents post a bond to secure any assets that were the subject of the arbitration. In the course of litigating this issue, the Company produced an unaudited financial statement from its certified public accountants dated as of December 31, 1990, showing that the company's liabilities exceeded its current assets by $127,504 and its total assets by $50,554. Although the arbitrators rendered an interim award directing the "Officers and Directors" of the Corporation to post a $175,000 bond, the bond was never posted, Respondents arguing that the arbitrators had no jurisdiction over them.

The Company also submitted a memorandum dated March 31, 1992, stating that before the arbitration had even commenced, Respondents had created another corporation ("Padco"), formed in May 1991, to which the Company had transferred its assets. In the words of the memorandum, "Stacey Allison's sole function after the transfer of the assets was to collect certain designated receivables and to pay the liabilities that were not transferred to Padco." The Respondents used some of the remaining assets to pay themselves and one of their wives for "loans and services" to the Corporation. Thereafter, Respondents caused Padco to sell its assets

to an unrelated corporation, CEI Inc., using the proceeds to pay creditors of Padco.

Despite the fact that the Company was insolvent, and had neither money to retain attorneys nor assets to protect, Respondents continued to defend the arbitration in the Company's name for their own interests. In addition, all four Respondents testified in the arbitration hearing and the attorneys ostensibly representing the Company represented Respondents whenever the interests of the Company were not identical to those of Respondents. In September 1993, the arbitrators rendered an award finding that the Company had breached the Agreement by terminating Einziger. The award was confirmed by New Jersey Superior Court. In March 1994, the arbitrators rendered a final award granting Einziger $614,753, including attorney's fees. This award was also confirmed by the Superior Court. Since the Company was insolvent, no part of the award was paid.

B. *Proceedings Below*

After the stay of this action was lifted, the Respondents moved for summary judgment dismissing the complaint on the ground that Einziger, having arbitrated his claim, was estopped from litigating the issue of whether his hiring and discharge had been fraudulent. Einziger cross-moved for summary judgment on two separate grounds: (i) that Respondents themselves in seeking a stay of this action had represented that the issue before the arbitrators and the district court was the same and (ii) that Respondents, having taken control of the litigation against the Company for their own personal interests -- *i.e.*, because they believed a successful result in the arbitration would constitute a defense in this action -- were bound by the result of the arbitration.

The district court granted Respondents' motion without addressing Einziger's argument that Respondents had controlled the defense of the arbitration (A-3-A-8).

The Court of Appeals for the Third Circuit affirmed the decision of the district court without opinion (A-1-A-2), and denied Petitioner's suggestion for rehearing (A-9).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals squarely conflicts with four decisions of this Court. This fact is more important than the specific issue in this case because the deliberate failure of the court of appeals to follow precedent utterly undermines the authority of this Court in declaring and assuring uniformity in the law decided by the federal courts. Moreover, as demonstrated below, the deviation from the rule declared four times by this Court was not only deliberate but was sought to be disguised by the failure of the court of appeals to write a decision.

The most recent decision of this Court with which the decision of the court of appeals conflicts is *Montana* v. *United States* 440 U.S. 147 (1979). That case is so recent that two justices now sitting concurred in the decision. This Court found that a constitutional question presented in the case before it had been adversely determined to the United States in a prior state proceeding and thus held that the United States, although not a party, having exercised control over the earlier litigation, was estopped from relitigating the issue. The Court stated, "[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he were a party of record." 440 U.S. 154.

The foregoing quote is taken from *Souffront* v. *La Compagnie des Sucereies de Puerto Rico*, 217 U.S. 475 (1910). In that case this Court held that the true owners of real property were bound by the result of an action conducted by others under their direction and for their benefit. 217 U.S. 486-87. The *Souffront* case, in turn, cited *Lovejoy* v. *Murray* 3 Wall (U.S.) 1 (1865) in which it was held that a party who takes over the

defense of an attaching officer is bound by the result in a subsequent suit against that party. The cases cited by the Court in support of its decision go back as far as the reign of Queen Elizabeth I (3 Wall 18-19). See also *Schnell* v. *Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 262 n.4 (1961), citing *Souffront* and *Lovejoy*.

There is no doubt that Respondents controlled the defense of the arbitration. The facts are established by their own papers. According to the Company's own certified public accountants, the Company was insolvent as of December 31, 1990, before the arbitration even began; Respondents formed Padco and transferred the Company's assets to it in May 1991, the same month that the New Jersey court directed arbitration; and prior to March 1992 the Respondents caused Padco to sell its assets to CEI, Inc.

Hence, by the time of the first hearing before the arbitrators, the Company was a shell and had no money to retain attorneys or any assets to protect from an adverse arbitration award. Only Respondents could finance the litigation, which they did in their own interest because they believed that a favorable arbitration award would constitute a defense to this action.

If there were any lingering doubt that Respondents controlled the litigation, it is dissipated by a letter written by the attorneys of record for the Company to the court considering Einziger's action to confirm the final award. In that letter, the attorneys expressly advised the court of the pendency of this action and argued that the court, in entering its order confirming the award, should say nothing that would jeopardize Respondents' posture in this action. Obviously, the Company itself would have no interest in the wording of the order on this issue. The letter, although written by the attorneys ostensibly representing the Company, was written on behalf of Respondents. More complete control of a litigation is difficult to imagine.

Given these indisputable facts, Einziger's petition should be granted on the basis of the court of appeals' square conflict

with four decision of this Court. There is more to this case, however, then any maltreatment of Einziger by the lower courts.

First, the court of appeals flouted the law declared by this Court deliberately. Einziger's briefs cited *Montana* v. *United States*, which in turn cited the *Schnell* and *Souffront* cases. In addition, Einziger cited two cases from the Third Circuit, *United States* v. *Webber*, 396 F2d 381 (1968) and *Ark-Tenn Distributing Corp* v. *Breidt*, 209 F2d 301 (1954). Finally he cited numerous cases from other circuits, *e.g., Explosives Corp. of Am.* v. *Garlam Enter. Corp.* 817 F2d 894 (1st Cir.) *cert. den.* 484 U.S. 925 (1987); *Alman* v. *Danin* 801 F2d 1 (1st Cir. 1986); *In re Teltronics Svs. Inc.* 762 F2d 185 (2d Cir. 1985), citing *Souffront; Southmark Properties* v. *Charles House Corp.* 742 F2d 862 (5th Cir. 1984); *In re Gottheimer* 703 F2d 1136 (9th Cir. 1983); *Drier* v. *Tarpon Oil Co.* 522 F2d 199 (5th Cir. 1975); *Von Opel* v. *Brownell* 244 F2d 789 (D.C. Cir) *cert den.* 355 U.S. 878 (1957). Hence, the court of appeals was well aware of the law not only declared by this Court but by all of the courts of appeals which have ruled on the issue for over forty years.

Second, Rule 10.1(c) in this Court provides that a reason for granting a petition for a writ of certiorari is that a court of appeals has decided a federal question in a way that conflicts with applicable decisions of this Court. The reason for this provision is clear: it is to promote uniformity between the decisions of the Court and the lower courts and uniformity among the decisions of the lower courts. This is one of the basic constitutional functions of this Court. Yet, the court of appeals in this case deviated not only from the law declared by this Court but from the law followed by the circuits, including its own.

The importance of this Court's constitutional function of instructing the lower courts and insuring uniformity is illustrated by the cases decided in the immediate past term. During October 1994 Term, this Court accepted 107 cases for review from the circuits and vacated or reversed 84 of those

decisions. See *New York Law Journal*, October 17, 1995, p. 3. In reversing these cases, the Court was exercising its function of declaring federal law and demonstrating to the lower courts what that law is. Uniformity of decisions in following this Court is essential to the bar and to litigants themselves. Litigants, like Einziger here, should be able to read this Court's cases and rely upon them for determining their legal rights or obligations, *i.e.*, they should be able, on the facts of their own cases, to predict what the lower courts are likely to do.

In this case, however, the court of appeals did not write a decision and the decision of the district court was expressly marked "Not for Publication". Thus, a future litigant would have no way of knowing that the United States District Court for the District of New Jersey and the Court of Appeals for the Third Circuit do not always follow the decisions of this Court and do not inform the bar when they fail to do so.

From June 1 through September 29, 1995, the Court of Appeals for the Third Circuit rendered 294 decisions without published opinions. See 61 F3d 894-98; 65 F3d 161-65; 66 F3d 310-14; 67 F3d 291-92; 68 F3d 456-58. Moreover, in only 28 of those cases was any opinion published, either of the lower court or a prior opinion of the court of appeals. Thus, there are 266 cases in the Third Circuit during that four month period that essentially constitute secret law, because they will not appear in the usual digests, or other research tools.

Obviously, the vast amount of litigation in the federal courts today requires the courts to dispose of a great many cases without written opinions. That necessity, however, does not justify the failure of the lower courts to follow established law. Indeed, with so many cases being decided without opinion it is even more important that the lower courts follow established law and not mislead the bar into believing that the law is being followed when it is not. Failure to do so will completely undermine this Court's position as the ultimate residuary and declarer of the law of the United States.

The court of appeals in this case, in the face of *Montana* v. *United States*, *supra*, and the other cases cited to it, simply overruled a result which had been determined by three New Jersey courts and a panel of arbitrators. Why the court of appeals did this is unknown other than perhaps it wanted to bring about a result which it found more "just" than the decisions of the courts that were primarily concerned with the merits of the case. The court of appeals did not write an opinion because it could not — there was no way it could have done so without exposing the fact that it was ignoring the applicable decisions of this Court.

This procedure can only be described as cynical. The court of appeals is well aware of the burdens on this Court and the fact that it is able to grant a small percentage of the petitions for writs of certiorari presented to it. Hence, it believes that its failure to follow the law pronounced by this Court will go unremedied. The creation of a body of law known only to the Court of Appeals for the Third Circuit cripples the constitutional function of this Court and should not be permitted.

CONCLUSION

The facts of this case set forth above cannot be disputed because they come from the written documents filed herein, including Respondents' own submissions. On these facts, the decision of the court of appeals squarely conflicts with four decisions of this Court. The failure of the lower court to follow these cases undermines the power and authority of this Court. The petition for a writ of certiorari should be granted.

Dated: December 15, 1995
New York, New York

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5123

MARK EINZIGER,

Appellant

V.

ARTHUR JACOBS; DONALD HELLER;
ELLIOT BLACK; KENNETH JACOBS

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 90-04779)
District Judge: Hon. Anne E. Thompson

Submitted Under Third Circuit LAR 34.1(a)
September 14, 1995
Before: MANSMANN, SCIRICA and NYGAARD,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court entered January 26, 1995 by and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT

_____

Circuit Judge

Attest:
/s/ P. Douglas Sisk

_____

P. Douglas Sisk, Clerk
Dated: Sep 20 1995

Certified as a true copy and issued in lieu of a formal mandate on November 17, 1995.

Teste: /s/ P. Douglas Sisk

Clerk, U.S. Court of Appeals for the Third Circuit

APPENDIX B

NOT FOR PUBLICATION

UNITED STATE DISTRICT COURT

DISTRICT OF NEW JERSEY

MARK EINZIGER,	:	Civil No. 90-4779 (AET)
Plaintiff,	:	
v.	:	
ARTHUR JACOBS, et al.,	:	OPINION
Defendants.	:	

THOMPSON, Chief Judge

This matter is before the Court on defendants' motion for summary judgment and plaintiff's cross-motion for summary judgment. For the following reasons, the Court will grant defendants' motion.

Background

In 1990, the defendants Arthur Jacobs, Elliot Black, Donald Heller, and Kenneth Jacobs formed Stacey Allison, Ltd. ("SAL"), a corporation intended to produce and sell potpourri and packaging for personal care products. On July 1, 1990, plaintiff Mark Einziger began employment as SAL's Vice President of Operations, pursuant to the terms of a written contract. On November 9, 1990, SAL terminated plaintiff's employment.

On December 5, 1990, plaintiff instituted an arbitration proceeding against SAL pursuant to the terms of his employment contract, section 15 of which provides, "any controversy or claim arising out of or relating to this Agreement, or any breach thereof, shall ... be settled by arbitration in accordance with the rules of the American Arbitration Association . . . ."

He asserted breach of contract as the basis for the arbitration proceeding. On December 28, 1990, plaintiff filed this lawsuit alleging that the defendants, as shareholders and directors of SAL, had fraudulently induced him into signing the employment contract in order to steal customers with whom plaintiff had previously done business. On October 7, 1991, this case was stayed case pending the completion of the arbitration proceeding.

On March 29, 1994, the arbitrators entered an award of $614,753.00 against SAL based on a finding that SAL breached the contract. The Superior Court of New Jersey subsequently entered a final judgment confirming the arbitration award. This Court reinstated this case on July 24, 1994. The Court granted each party leave to amend its pleadings to address the arbitration proceedings. Plaintiff added allegations that the arbitrator ordered these defendants, as directors of SAL, to post a bond of $175,000 to secure SAL's assets; that the defendants failed to post the bond; that SAL repaid loans to the defendants during the course of the arbitration; and that SAL has not paid the arbitration award. Defendants amended their answer to assert the arbitration proceeding as a defense. Each party now moves for summary judgment.

Discussion

A court may enter summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has satisfied this initial burden, the opposing party must establish that a genuine issue exists. *Jersey Central Power & Light Co. v. Lacey Township*, 772 F.2d 1103, 1109 (3d Cir. 1985), *cert. denied* 475 U.S. 1013 (1986). Not every issue of fact will be sufficient to defeat a motion for summary judgment; issues of fact are genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, the opposing party cannot rest upon mere allegations; it must present actual evidence that creates a

genuine issue of material fact. *Id.* at 249 (citing *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)). The court must draw all reasonable inferences in the opposing party's favor, and must accept that party's evidence when considering the merits of the summary judgment motion. *See Pollock v. American Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986).

In deciding a motion for summary judgment, it is not the court's role to make findings of fact, but to analyze the facts presented and determine if a reasonable jury could return a verdict for the nonmoving party. *See Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1262 (1993). It is in this light that the Court must analyze the facts of this case.

The Federal Arbitration Act, 9 U.S.C. §§ 1-15, requires courts to recognize and enforce contractual arbitration provisions. A claim that was or should have been decided in arbitration pursuant to such a contractual provision may not be litigated in federal court. *See Schattner v. Girard, Inc.*, 668 F.2d 1366, 1368 (D.C. Cir. 1981). Thus, if plaintiff's employment contract allowed plaintiff to raise his fraudulent inducement claim against the directors in the arbitration proceeding, plaintiff will be barred from asserting it now. *See Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).

The first issue the Court must analyze is whether the arbitration clause in the employment contract covers this dispute. The contract requires the arbitration of "any controversy or claim arising out of or relating to this Agreement, or any breach thereof . . . ." The Supreme Court has held that, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1982). The Second Circuit has held that claims of fraud in the inducement are arbitrable

unless specifically excluded from an arbitration clause. *S.A. Mineracao Da Trindade Samitri v. Utah Int'l. Inc.*, 745 F.2d 190, 195 (2d Cir. 1984). In light of these standards, the arbitration clause in plaintiff's employment contract is broad enough to encompass claims of fraudulent inducement to the contract.

Plaintiff argues that his claim of fraudulent inducement is not barred because he asserts it against the individual directors of SAL, while the arbitration was against SAL as a corporate entity. The individual directors, however, were within the scope of the arbitration clause and subject to claims asserted under it. It is well established that where "a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreement." *E.g., Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110, 1121 (3d Cir. 1993); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281-82 (6th Cir. 1990). The arbitrators in this case recognized that the nonsignatory directors of SAL were subject to its jurisdiction under the arbitration clause as they ordered them to post a bond to secure assets of SAL. The Court is therefore satisfied that the arbitration clause in plaintiff's employment contract covered claims against the directors of SAL.

As plaintiff's fraudulent inducement claim against the directors of SAL could have been raised in the arbitration proceeding, his failure to raise the claim there bars him from litigating it in this Court. Moreover, principles of judicial estoppel now bar plaintiff from establishing a claim of fraudulent inducement. Plaintiff's successful claim of breach of contract in the arbitration necessary established the validity of the contract. Plaintiff may not now argue under the same core of operative facts that the contract is invalid as induced by fraud. *See Economu v. Borg-Warner Corp.*, 652 F. Supp. 1242, 1250 (D. Conn. 1987), *aff'd*, 829 F.2d 311 (2d Cir. 1988).

Conclusion

In light of the foregoing, the Court will grant defendants' motion for summary judgment. An appropriate order will be filed herewith.

UNITED STATE DISTRICT COURT

DISTRICT OF NEW JERSEY

MARK EINZIGER,	:	Civil No. 90-4779 (AET)
Plaintiff,	:	
v.	:	
ARTHUR JACOBS, et al.,	:	ORDER
Defendants.	:	

For the reasons stated in this Court's opinion filed even date herewith;

It is on this 24th day of January, 1995;

ORDERED that plaintiff's motion for summary judgment be and hereby is DENIED; and it is further,

ORDERED that defendant's motion for summary judgment be and hereby is GRANTED and this case is hereby CLOSED.

/s/ Anne E. Thompson

ANNE E. THOMPSON, CHIEF JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5123

MARK EINZIGER,

Appellant

v.

ARTHUR JACOBS; DONALD HELLER;
ELLIOT BLACK; KENNETH JACOBS

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *CHIEF JUDGE*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE AND SAROKIN *CIRCUIT JUDGES*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By The Court,

/s/
Circuit Judge

Dated: Nov 09 1995

No. 95-968

Supreme Court
JAN 18 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MARK EINZIGER,

Petitioner,

—v.—

ARTHUR JACOBS, DONALD HELLER, ELLIOT BLACK, and KENNETH JACOBS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-968

MARK EINZIGER,

Petitioner,

—v.—

ARTHUR JACOBS, DONALD HELLER, ELLIOT BLACK, and KENNETH JACOBS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Arthur Jacobs, Donald Heller, Eliot Black and Kenneth Jacobs (hereinafter collectively referred to as the "Shareholders" or "respondents") respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Third Circuit's decision in this matter.

OPINIONS BELOW

The September 20, 1995, two-page "judgment order" of the United States Court of Appeals for the Third Circuit is unpublished and is reproduced in the appendix to the petition for

certiorari at page A-1 through A-2.[1] The November 9, 1995, order of the United States Court of Appeals for the Third Circuit denying petitioner's suggestion for rehearing *en banc* is reproduced at Pet.App.9a.

The January 26, 1995, opinion and order of the U.S. District Court for the District of New Jersey granting defendants' motion for summary judgment are unpublished and are reproduced at Pet.App.3a-7a (the opinion) and Pet.App.8a (the order). Because the petition for writ of certiorari was filed before the District Court's entry of an order in lieu of mandate on December 19, 1995, the order is reproduced in the appendix to this brief at 1a.[2]

COUNTERSTATEMENT OF THE CASE

A. Preliminary Statement.

This matter involves interpretation of New York and New Jersey state common law regarding (1) the application of an arbitration clause to claims which could have been asserted in arbitration to bar the subsequent litigation of those claims; (2) judicial estoppel principles precluding a litigant from seeking recovery in a subsequent action premised upon the unenforceability of a contract after establishing the validity of that contract in an arbitration proceeding; and (3) rejection of alter ego theories because of lack of evidence of any corporate impropriety or abuse of the formalities of corporate existence. Neither the decision below nor the record raises the Question Presented in the petition.

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[1] Hereinafter citations to the appendix to the petition will be stated as: "Pet.App. __a"; citations to the petition itself will be stated as "Pet. __."

[2] Hereinafter citations to the appendix to this brief will be referred to as "RA__a."

In proceedings below, which followed an arbitration award finding that Mark Einziger (hereinafter referred to as "Einziger" or "petitioner") was entitled to damages against Stacey Allison, Ltd. ("Stacey Allison") for breach of Einziger's Employment Agreement, Einziger sought to compel payment of the arbitration award by the Shareholders. Petitioner's Complaint in the United States District Court alleged that the Shareholders had fraudulently induced him to enter into the very same Employment Agreement. He argued (although he did not plead) that the Shareholders had paid for the defense of the arbitration and were therefore personally bound by the result.

The District Court held that the finding of the validity of the Employment Contract and its breach foreclosed Einziger from seeking to set aside the Contract. It further found that Einziger was obligated to assert all of his claims in the arbitration and, therefore, could not pursue the Shareholders in District Court on some different theory from that presented in the arbitration. The District Court's judgment was affirmed, without opinion, by the Third Circuit Court of Appeals.

Neither the District Court nor the Court of Appeals discussed Einziger's argument that the Shareholders' alleged paying for defense of the arbitration bound them by the result. Presumably, there was no discussion because the claim was never plead, nor was there any evidence before the District Court from which the Court could conclude that the Shareholders had controlled the arbitration: not an affidavit, not a check stub, not an entry in a book of account. All that was presented was the bald statement of counsel for petitioner that the Shareholders paid for the defense.

In an effort to circumvent the record below, petitioner has concocted a conspiracy among the Shareholders, the District Court and the Third Circuit Court of Appeals. *See* Pet.4-8. The opaque theory seems to be that the Courts subverted justice by ignoring alleged control of the arbitration, thereby obviating the necessity of dealing with controlling precedent.

Petitioner's argument is an insult and an outrage. It impugns the integrity of our Courts. It refuses to recognize that the rulings below are the result of petitioner's failure to present any proof of improper conduct by the Shareholders. The Petition for a Writ of Certiorari should be summarily denied and sanctions imposed for the filing of this frivolous Petition.

B. Rulings Below.

A Complaint in this cause was filed in the United States District Court for the District Court of New Jersey, based upon diversity jurisdiction, on December 28, 1990. The Complaint alleged that the Shareholders of Stacey Allison fraudulently induced Einziger to enter into an Employment Agreement with Stacey Allison in a scheme to steal his customer base. Einziger sought to avoid the contract and impose individual liability against the Shareholders for fraud. The federal lawsuit was stayed from October 7, 1991 to September 1994 pending resolution of Einziger's arbitration proceeding against Stacey Allison, a New Jersey corporate entity, which had been filed on December 10, 1990 and requested damages, including unpaid salary under the Employment Agreement.[3]

Summary judgment was entered by the District Court in favor of the Shareholders on January 26, 1995 dismissing Einziger's Complaint and denying his cross-motion for summary judgment. Einziger unsuccessfully appealed to the United States Court of Appeals for the Third Circuit which affirmed in a "judgment order" and thereafter summarily denied petitioner's suggestion for rehearing *en banc*.

Petitioner contends that the District Court's dismissal of his claims, and the Third Circuit's affirmance, were in conflict with decisions of this Court. Pet.5. Respondents maintain that

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[3] A comprehensive discussion of the arbitration proceedings will be provided in the Counterstatement of the Case, *infra*.

the proceedings below constituted a routine application of summary judgment procedure to a particular set of facts.

C. The Employment Relationship.

In early 1990, the Shareholders, entered into a business venture to form a corporation to manufacture and sell pot-pourri and related gift items. Arthur Jacobs, a shareholder, entered into discussions with Einziger for the purpose of employing Einziger as Senior Vice President of Operations for the corporation. At the conclusion of extensive negotiations on July 1, 1990, Einziger entered into an Employment Agreement with Stacey Allison. The Employment Agreement contained a clause that New York's substantive law would govern any dispute arising out of the contract and a broad form arbitration clause requiring arbitration of any controversy or claim arising out of or relating to the contract or any breach thereof. Following four months of inept stewardship, Einziger's employment with Stacey Allison was terminated on November 9, 1990.

D. The Arbitration Proceedings.

On December 10, 1990, Einziger filed a Demand for Arbitration which alleged that Stacey Allison's termination of his employment breached the terms and conditions of his Employment Agreement. Einziger sought damages including lost salary and benefits allegedly due him under the Employment Agreement. On December 28, 1990, Einziger filed a lawsuit in the United States District Court for the District of New Jersey against the Shareholders in their individual capacities for fraudulent inducement of the identical contract which he sought to enforce in the arbitration. The District Court's subject matter jurisdiction was purportedly premised upon diversity of citizenship. (Einziger, a New Jersey resident, failed to join Stacey Allison, a New Jersey corporation, as a party to the litigation.) On October 7, 1991, the District Court

indefinitely stayed its proceedings pending resolution of the arbitration.

Hearings in arbitration continued through 1993. Einziger submitted all proofs relevant to his breach of contract claim against Stacey Allison. Of equal import Einziger admittedly argued, although he did not formally allege, fraudulent inducement of the Employment Agreement during the arbitration. In September 1993, the arbitrators determined that Stacey Allison had breached the Employment Agreement, thereby establishing its validity, in terminating Einziger's employment and awarded $614,753 in damages, including attorneys' fees.

E. Judicial Proceedings Before the District Court.

Following entry of the arbitration award, the United States District Court removed its stay of the proceedings. Einziger sought to assert individual liability against the Shareholders for the judgment entered against Stacey Allison. On January 3, 1995, Einziger was granted leave to amend his Complaint which had averred that the Shareholders had fraudulently induced his execution of the Employment Agreement in a supposed effort to pilfer his customers. The amendment merely set forth events, including the arbitration, which had occurred after the filing of the original Complaint. The Amended Complaint was devoid of any allegation averring an alter ego theory of individual liability. The Shareholders were also granted leave to amend their Answer to interpose the arbitration as a defense to the federal litigation.

Einziger moved for summary judgment. In support of the motion he submitted material which had been presented in the arbitration. He argued that the Shareholders had controlled and paid for the arbitration and were therefore bound by the result. However, he submitted no evidence in support of that contention.

The Shareholders moved to dismiss the Complaint as it sought to declare invalid a contract which had been found valid in arbitration and because Einziger had contractually agreed to bring claims in arbitration and was therefore barred from litigating in federal court.

The District Court entered judgment in favor of the Shareholders, dismissed Einziger's Complaint and denied his cross-motion. The District Court correctly ruled in favor of the Shareholders, holding that: (1) given the broad form arbitration clause in the Employment Agreement, Einziger's failure to assert the fraudulent inducement claim against Stacey Allison or its Shareholders in the arbitration proceeding served as a bar to litigation of the identical issue in the subsequent federal court proceeding; and (2) Einziger was judicially estopped, pursuant to New York law, from asserting that the Employment Agreement was vitiated by fraud after successfully obtaining an award in the arbitration premised upon the contract's validity. Pet.App.8a.

Without discussion, the District Court rejected Einziger's cross-motion which alleged that the Shareholders had engaged in corporate impropriety, controlled/financed the previous arbitration proceedings on behalf of Stacey Allison and were liable for the judgment entered against the corporation. Einziger had utterly failed to submit any proofs showing impropriety, control or financing by the Shareholders.

On September 20, 1995, the United States Court of Appeals for the Third Circuit summarily affirmed the District Court's order without opinion and rejected Einziger's Suggestion for Rehearing *En Banc* on November 17, 1995. An Order in lieu of Mandate was entered in the United States District Court for the District of New Jersey on December 22, 1995. RA1a. The instant Petition for a Writ of Certiorari was docketed on December 19, 1995.

REASONS FOR DENYING THE WRIT

I. THE UNPUBLISHED DECISION OF THE DISTRICT COURT BELOW, AS SUMMARILY AFFIRMED BY THE THIRD CIRCUIT COURT OF APPEALS, DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

A. Introduction.

While Einziger argues that the decisions of the Courts below conflict with the decision of this Court in *Montana v. United States*, 440 U.S. 147 (1979) (Pet.7) and other precedent, the Third Circuit's unpublished September 20, 1995 decision does not conflict with any decision of this Court, nor that of any other Court of Appeals, and consequently does not call for review. *See* Supreme Court Rule 10(a) and (c).

Einziger urges that the Shareholders controlled the arbitration and are therefore personally bound by the result. Neither the District Court nor the Third Circuit Court of Appeals discussed this contention; hence there is no conflict with existing decisional law on the issue. Moreover, the courts below refrained from dealing with this argument because there is absolutely nothing in the record to support it. Although petitioner's counsel *said* in his brief and in oral argument that the Shareholders controlled and paid for the defense of the arbitration, he produced no proofs to support this statement.

In any event, even if petitioner could point to a conflict between the Third Circuit's decision and that of this Court, which he has utterly failed to do, he would still be required to establish that the conflict was of an "intolerable" nature which must be both "direct and apparent." *See* R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* (7th ed. 1993) at §§ 4.3; 4.4; and 4.5. Such a serious conflict cannot be demonstrated as the District Court said nothing in its unpublished opinion with respect to the issue which suppos-

edly establishes the conflict and the Third Circuit Court of Appeals said nothing at all, save "affirmed." The argument of "conflict" is nothing more than an effort to fabricate, out of whole cloth, an issue which does not exist within the record.

Einziger attempts to avoid his lack of proof by arguing that there was some sort of judicial conspiracy against him. Einziger's irrational "conspiracy" allegations are palpably ludicrous. Absent any proof on the averred "issue", the District Court and Third Circuit Court of Appeals properly ignored his contentions.

B. Discussion.

Einziger argues that the courts below have decided the matter at bar differently from *Montana v. United States*, 440 U.S. 147 (1979), which he cites for the proposition that "[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right . . . is as much bound . . . as he would be if he were a party of record." *Id.* at 154. The lower courts' decisions do not conflict with *Montana* or any of the other authority of this Court cited in Einziger's petition[4], because no proof was ever adduced that the Shareholders engaged in the proscribed conduct. The record in the courts below was vastly different from that considered by this Court in previous cases in which the Court found it appropriate to bind a non-party by a judgment.

In *Montana*, a contractor challenged the constitutionality of a state tax levied against public contractors. The state courts held the tax to be constitutional. The United States then instituted suit to set aside the tax statute. Montana claimed that the government was bound by the earlier litigation. The government stipulated that it had (i) required the original lawsuit's filing; (ii) reviewed and approved the Complaint; (iii) paid the attorneys' fees and costs of the litigation;

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[4] *Souffront v. La Compagnie des Sucereies de Puerto Rico*, 217 U.S. 475 (1910) and *Lovejoy v. Murray*, 3 Wall (U.S.) 1 (1865)

(iv) directed the appellate practice; (v) submitted a brief as *amicus curiae*; and (vi) compelled the contractor to abandon the appeal. The government also conceded that it was the real party in interest in the first litigation. In this context, this Court held the United States to be bound by the result of the prior suit. *Montana*, 440 U.S. at 154.

As previously adverted to, none of the dispositive factors present in *Montana* are contained in the record here. There was no proof that the Shareholders either financed or controlled the arbitration. The bald assertions of petitioner's counsel were no substitute for evidence and could not save his Complaint from summary dismissal. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (holding that a party opposing summary judgment may not rest on mere allegations; it must present actual evidence that creates a material issue of fact). Although the petitioner argued for the application of the rule of law contained in *Montana*, Einziger failed to supply the factual predicate necessary in order that *Montana* be controlling precedent.

Souffront involved a plaintiff's second attempt to claim title to realty in Puerto Rico. The plaintiffs had initiated an action in the courts of Puerto Rico against sellers of realty claiming title to the property at issue. The sellers had sold the property to a third party before the inception of the lawsuit but defended the litigation, as required by the contract of sale, at the direction of the third party buyers to free the realty's title from any cloud. The Puerto Rican court ruled in favor of the nominal defendants, the sellers, who openly represented the interests of the third party buyers.

In the second suit in federal court, the plaintiffs sought to re-litigate the title issue directly against the third party buyers who were not nominal parties to the original Puerto Rican litigation and the suit was dismissed on *res judicata* grounds. This Court, in affirming the dismissal, held that the third party buyers were entitled to avail themselves of the judgment rendered in favor of the sellers because they had ostensibly

controlled the litigation for their own benefit. *Souffront*, 217 U.S. at 485.

Again, all of the facts concerning the actions, identities and interests of the parties in the first litigation were before the court in the second litigation.

In *Von Opel v. Brownell*, 244 F.2d 789, 791-792 (D.C.Cir. 1957), the District Court had previously determined that the principal's corporation was an enemy of the United States government. The corporate principal was foreclosed from relitigating this determination because he, admittedly, had full control of the litigation, retained counsel and authorized prosecution of the appeal as the entity's representative to protect his own financial interests in the first litigation. Accordingly, the District Court dismissed his individual intervention complaint under *res judicata* principles.

The remaining cases cited by petitioner, *Explosives Corp. of America v. Garlam Enterprises Corp.*, 817 F.2d 894, 904-905 (1st Cir. 1987); *Alman v. Danin*, 801 F.2d 1 (1st Cir. 1986); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862 (5th Cir. 1984); *In re Gottheiner*, 703 F.2d 1136 (9th Cir. 1983); and *Drier v. Tarpon Oil Co.*, 522 F.2d 199 (5th Cir. 1975), are alter ego cases. In each matter, the controlling shareholder of a corporation treated the corporation as his personal property and ignored corporate formalities. The proofs showed that the shareholder controlled, directed and financed the litigation which he then sought to disavow, ignored the separate existence of the corporation and even preferred himself over other creditors of the corporation. In such circumstances, Courts correctly held that the shareholder was the alter ego of the corporation and bound by a judgment against the corporation. The findings of *res judicata* were made only where the record reflected financial and strategic control over the previous litigation.

It is a fundamental principle of corporate law that if the Shareholders are to be bound as alter egos, they must be

proved to be alter egos. Petitioner's counsel's specious allegations could not rescue Einziger's Complaint from dismissal. Simply put, Einziger's theory was meritless and unworthy of comment.

II. THE PETITION FOR CERTIORARI DOES NOT PRESENT SPECIAL AND IMPORTANT REASONS FOR THE EXERCISE OF THIS COURT'S JURISDICTION.

The decision below also does not warrant review by this Court as it does not exhibit any of the "special and important reasons" necessary for issuance of a writ of certiorari. *See* Supreme Court Rule 10. This case does not present (1) a conflict with this Court's precedents or decisions of other Circuit Courts of Appeals (as previously discussed); (2) a departure from accepted or usual course of judicial proceedings compelling the exercise of this Court's supervisory powers; or (3) a decision addressing an important question of federal law that should be decided by this Court. *Id.* Factors of a magnitude which would ordinarily compel certification review are absent from this litigation.

The Third Circuit's unpublished decision merely affirmed, without comment, a routine, unpublished decision of the District Court granting summary judgment. The District Court was serving the function of a state court in a matter founded on diversity jurisdiction. It interpreted state common law regarding (i) arbitrability of a fraud claim against non-signatory shareholders of a corporate entity which was a party to an arbitration agreement; (ii) estoppel principles barring a litigant's efforts to recover on two inherently inconsistent causes of action alleged in separate proceedings; and (iii) application of an unplead alter ego theory where the record was devoid of any evidence that the Shareholders engaged in corporate impropriety or abuse of the corporate formality. *See Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938) (holding

that federal courts must apply state substantive law when adjudicating issues arising under their diversity jurisdiction).

Because the district court proceedings below did not involve any novel or significant federal constitutional or statutory questions, the district court's opinion contains only a straight-forward application of the summary judgment standard to the petitioner's state law causes of action and a particular set of facts. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985) (indicating that considerable deference afforded to lower federal courts' interpretation of state laws); *See also* R. Stern, E. Greisman and S. Shapiro, *Supreme Court Practice* (7th ed. 1993) § 4.3 (commenting that certification review is ordinarily inappropriate when a lower federal court is making a determination of state law as it rests upon adequate non-federal grounds).

III. THE LOWER COURTS' CORRECT APPLICATION OF STATE SUBSTANTIVE LAW DOES NOT WARRANT EXERCISE OF THIS COURT'S JURISDICTION.

It is submitted that the district court's opinion, as affirmed by the Third Circuit, was a correct application of New York substantive law to the case as pled. The argument of the case below departed substantially from the pleadings. The Complaint alleged fraud in the inception of the Employment Contract. There was no allegation that the Shareholders were alter egos of Stacey Allison. Petitioner's argument was primarily addressed to the alter ego theory of *Montana v. United States*, *supra*, without any factual proofs supporting the theory.

Conspicuously absent from Einziger's petition is any substantive discussion of the District Court's opinion which held that (1) presented with a broad form arbitration clause, claims for fraudulent inducement are subject to arbitration and (2) petitioner was estopped from asserting that he had been

fraudulently induced into entering the Employment Agreement where he had previously obtained a breach of contract award against Stacey Allison establishing its validity. Pet.App.5a, 6a and 7a.

Although the initial portion of the District Court's holding applied principles of arbitrability under the Federal Arbitration Act, 9 U.S.C. §§ 1-15, those same principles are consistent with New York law compelling arbitration of claims for alleged fraudulent inducement of the entire agreement. Pet.App.6a. *Prima Paint Corp. v. Flood & Conklin Mfg., Co.*, 388 U.S. 395, 403-404 (1967); *S.A. Mineracao Da Trindade Samitri v. Utah Int'l, Inc.*, 745 F.2d 190, 195 (2d Cir. 1984); *In re Weinrott*, 32 N.Y.2d 190, 198-199, 344 N.Y.S.2d 848, 298 N.E.2d 42 (1973). Thus, any claim of fraud against the corporation is arbitrable.

The District Court's finding that non-signatories, such as officers and directors of a corporation, to an arbitration clause were subject to arbitration of claims against them was equally consistent with New York substantive law. Pet. App.6a. *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110, 1121 (3d Cir. 1993); *In re Neirs-Folkes, Inc.*, 75 A.D.2d 787, 788, 428 N.Y.S.2d 248 (1980), *aff'd*, 53 N.Y.2d 1038, 442 N.Y.S.2d 487, 425 N.E.2d 875 (1981) (rejecting attempt to circumvent arbitration clause by naming directors and officers in their individual capacities in a separate litigation arising out of dispute governed by broad form arbitration clause as "contrary to established policy of [New York] state."). Under these well-settled federal and state law principles, claims against the Shareholders were subject to arbitration despite their non-signatory status to the Employment Agreement.

Einziger also admitted below that the identical constellation of facts submitted to the arbitrators in support of his breach of contract recovery were to be submitted as the basis of recovery for fraudulent inducement of the very same Employ-

ment Agreement in the District Court proceeding. Petitioner's chameleon-like litigation tactics were rejected by the Third Circuit under state law judicial estoppel principles. Pet.App.6a. *See Economu v. Borg-Warner Corp.*, 652 F.Supp. 1242, 1250 (D.Conn. 1987), *aff'd*, 829 F.2d 311 (2d Cir. 1988) (interpreting New York law) (holding that "[p]laintiff was given the opportunity to litigate his claims under the contract at arbitration and, in fact, relied on the validity of that contract as a basis for his claims. He cannot now be heard to claim that it is invalid as a result of fraudulent inducement.") (citation omitted).

In short, petitioner ratified the Employment Agreement in successfully prosecuting his breach of contract claim against Stacey Allison in the arbitration and was properly foreclosed from disavowing the identical contract in the subsequent federal court litigation. It is submitted that the decisions below are a correct application of the law to the pleadings and to the evidence presented. It is also submitted that the alter ego theory, while argued, was not before the courts below as there was no proof offered.

Not only is the Third Circuit's decision consistent with this Court's precedent, but it also appropriately applied state substantive law in disposing of the issues presented. Accordingly, the petition does not warrant grant of this Court's exercise of jurisdiction.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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January 17, 1996

APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Original Filed December 20, 1995
Civil Action 90-4779 (AET)

MARK EINZIGER,

Plaintiff,

—v.—

ARTHUR JACOBS, DONALD HELLER, ELLIOT BLACK and KENNETH JACOBS,

Defendants.

ORDER OF JUDGMENT ON THE MANDATE

Pursuant to the Certified Judgment Order issued in lieu of a Formal Mandate by the United States Court of Appeals for the Third Circuit entered on November 17, 1995 and heretofore filed in these proceedings:

IT IS on this day 19th of December 1995,

ORDERED THAT:

1. After consideration of all contentions raised by appellant it is hereby adjudged and ordered that the judgment of this district court entered January 26, 1995 was AFFIRMED; and

2. An Order on the Mandate is hereby ENTERED terminating the above-captioned proceedings with prejudice.

/s/ ANNE E. THOMPSON
Hon. Anne E. Thompson, C.U.S.D.J.

Supreme Court, U.S.
FILED
JAN 25 1996
CLERK

(3)

No. 95-968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MARK EINZIGER,

Petitioner,

vs.

ARTHUR JACOBS, DONALD HELLER, ELLIOT BLACK, and KENNETH JACOBS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

Two points in Respondents' Brief in Opposition require a brief reply.

First, Respondents argue at pp. 8 *et seq*. that there was no proof that they controlled the prior litigation before the arbitrators and the New Jersey courts. This argument is an imposition on this Court for the following reasons.

(a) Stacey Allison was insolvent and had neither funds to pay an attorney nor assets to protect. Hence it had no reason or ability to defend itself.

(b) At no time during the course of this entire litigation have Respondents denied that they paid for and controlled the litigation.

(c) Respondents had an interest in controlling the prior litigation because they believed that a victory in the arbitration would constitute a defense in this action.

(d) Even if some mysterious entity or person other than Respondents had paid for the prior litigation, evidence of Respondents' control is overwhelming. Thus, they had the attorneys ostensibly representing Stacey Allison oppose and attack in the courts an interim order by the arbitrators requiring the Respondents to post a bond to secure any award even though Stacey Allison had no interest in the issue and, indeed, would have been benefited by the posting of the bond if it had had any assets. In addition, after the final arbitration award, the attorneys for Stacey Allison addressed a letter to the New Jersey Superior Court considering confirmation of the award arguing that any order entered by that court should not contain any language from which it could be inferred that Respondents were bound by the award. No clearer example of the shareholders preferring themselves and their interests over that of Stacey Allison could be imagined.

This evidence was in the record and expressly called to the attention of the Court of Appeals for the Third Circuit. That court, however, refused to follow the settled law established by this Court.

Second, building on their claimed lack of participation in the prior litigation, Respondents argue at pages 12-13 of their Brief that there is no special reason for the exercise of this Court's jurisdiction. On the contrary, there exists no better reason for the exercise of this Court's jurisdiction than to ensure uniformity in the federal law and to correct decisions of the lower courts that flout that uniformity.

Although at pages 9-11 of their Brief Respondents discuss and attempt to distinguish nearly all of the cases cited in the

Petition, they do not cite one case in which a non-party who participated in any way in a prior litigation was not held to be bound by the result of that litigation. One case so holding would be worth more than all of the nit-picking distinctions of the cases cited by Petitioner, but Respondents could not find one. Nor, in spite of their argument at pp. 13-15 of their Brief that state law applies, do they cite one state decision in support of their position. Hence, the rule that such non-parties are bound is uniform among the cases decided by this Court, the prior cases decided by the Court of Appeals for the Third Circuit, the cases decided by the other courts of appeals, and the state courts.

Respondents appear to think that the aberration exposed in this case is not worthy of this Court's attention because neither the district court nor the court of appeals published an opinion (see pp. 8-9 of their Brief). They even gratuitously cite a text telling this Court what it should do. The failure to write an opinion, however, is what makes the action of the court of appeals so insidious. Litigants can to some extent protect themselves from published opinions that do not follow the law — at least they are warned. Where a decision which flatly contradicts the rulings of this Court is unpublished, however, litigants have no way of predicting what the courts will do.

The tens of thousands of litigants who are parties to actions in the federal courts each year, no matter what the issues in their cases or the basis for federal jurisdiction, are entitled to assume that the courts will follow the law propounded by this Court. If the lower courts fail to do so and cover up those failures by deciding cases without opinion, these litigants cannot intelligently evaluate their rights.

This case provides a perfect example. It became clear almost from the beginning of the arbitration that Stacey Allison was insolvent. At that point, Petitioner could have saved time, legal expense, and disbursements by abandoning the arbitration and proceeding with this action. Respondents, however,

continued to defend the arbitration and Petitioner was not only required to pursue the case but also had the right to conclude on the basis of uniform prior law that Respondents would be liable for any award. The Court of Appeals for the Third Circuit, however, refusing to follow this Court, denied such liability. In so doing, they wasted nearly five years of the parties' time and money and utterly undermined any predictability in the law as well as the Constitutional authority of this Court.

The petition for a writ of certiorari should be granted.

Dated: January 23, 1996
New York, New York

Respectfully submitted,

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